Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

PICARD LOSIER AND ASSOCIATES
Petitioner
V.
GOGOL KALATSCHINOW
Respondent

On Petition For a Writ of Certiorari
To
The Supreme Court
of the
Commonwealth of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

Picard Losier and Associates
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QUESTIONS PRESENTED

A. WHETHER THE SUPREME COURT OF PENNSYLVANIA VIOLATED PETITIONER'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHEN IT AFFIRMED THE LOWER COURTS' AWARD OF EXCESSIVE PUNITIVE DAMAGES IN CONTRAVENTION OF THE DECISION OF THE UNITED STATES SUPREME COURT IN THE CASE OF STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY V. INEZ PREECE CAMPBELL, ET. AL., 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) .

B. WHETHER THE SUPREME COURT OF PENNSYLVANIA VIOLATED PETITIONER'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHEN IT AFFIRMED THE LOWER COURTS' IMPOSITION OF A LESSER BURDEN OF PROOF FOR CLAIMS OF EMOTIONAL DISTRESS IN CIVIL ACTIONS PURSUANT TO THE DRAGONETTI ACT THAN THAT ESTABLISHED FOR CLAIMS OF EMOTIONAL DISTRESS IN OTHER CIVIL ACTIONS?

C. WHICH WHETHER THE SUPREME COURT OF PENNSYLVANIA VIOLATED PETITIONER'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW

UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHEN IT AFFIRMED THE LOWER COURTS' DENIAL OF PETITIONER PICARD LOSIER AND ASSOCIATES' PETITION FOR RELIEF FROM DEFAULT JUDGMENT, BASED UPON THE RETROACTIVE APPLICATION OF A RULE OF LAW THAT WAS NOT IN EFFECT AT THE TIME PETITIONER FILED FOR RELIEF FROM DEFAULT, WHICH RULE HAS SINCE BEEN REJECTED BY PENNSYLVANIA'S SUPERIOR COURT?

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CITATIONS TO OPINIONS AND ORDERS ENTERED IN THE CASE

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Gogol B. Kalatschinow v. Alex H. Pierre, Picard Losier and Associates and Anthony Bombaci, Superior Court of Pennsylvania, Docket Nos. 2993 EDA 2002, 3114 EDA 2002, and 3649 EDA 2002; Opinion and Order of May 18, 2004, affirming in part, vacating in part, the judgment of the Court of Common Pleas, Philadelphia County.

Gogol B. Kalatschinow v. Alex H. Pierre, Picard Losier and Associates and Anthony Bombaci, Supreme Court of Pennsylvania, Docket No. 286 EAL 2004; Order of October 28, 2004, denying Losier's Petition for Allowance of Appeal.

Gogol B. Kalatschinow v. Alex H. Pierre, Picard Losier and Associates and Anthony Bombaci, Supreme Court of Pennsylvania, Docket No. 286 EAL 2004; Order of December 15, 2004, denying Losier's Petition for Reconsideration of Petition for Allowance of Appeal.

BASIS OF JURISDICTION IN THE UNITED STATES SUPREME COURT

The United States Supreme Court has jurisdiction of this matter pursuant to Article III, section 2 of the United States Constitution.

Petitioner Picard Losier and Associates ('Losier') requests review of the December 15, 2004 Order of the Supreme Court of the Commonwealth of Pennsylvania ('Pennsylvania Supreme Court'), in the matter of Gogol B. Kalatschinow v. Alex H. Pierre, Picard Losier and Associates, and Anthony Bombaci, No. 286 EAL 2004. Said order denied Losier's Petition for Reconsideration of the Pennsylvania Supreme Court's decision of October 28, 2004, denying Losier's Petition for Allowance of Appeal from the May 18, 2004 decision of the Pennsylvania Superior Court, affirming the judgment of the Court of Common Pleas of Philadelphia County entered March 25, 2003, in the matter of Gogol B. Kalatschinow v. Alex H. Pierre, Picard Losier and Associates, and Anthony Bombaci, No. 0917, June Term, 2000.

Losier asserts herein that the Pennsylvania Supreme Court, in affirming the judgments of the lower courts, denied him due process and equal protection of the laws, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and in contravention of this Court's decisions in BMW of America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L.Ed. 2d 809 (1996), and State Farm Mutual Auto Insurance Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed. 2d 585 (2003).

CONSTITUTIONAL PROVISIONS, STATUTES, AND CODES INVOLVED

1. Article V of Amendment ('The Fifth Amendment') to the United States Constitution provides, in pertinent part, as follows:

"No person shall be...deprived of life, liberty or property, without due process of law;...."

2. Article XIV of Amendment ('The Fourteenth Amendment") to the United States Constitution provides, in pertinent part, as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. The Dragonetti Act , Title 42 Pennsylvania Consolidated Statutes Annotated (Pa. C.S.A.), section 8351 et. seq. (see appendix for full text of the statute).

4. The Pennsylvania Rules of Civil Procedure (Pa.R.C.P.), Title 42 Pa.C.S.A. Rules 1-4025 (in effect as of June 8, 2000)

STATEMENT OF THE CASE

On June 8, 2000 Gogol B. Kalatschinow ('Kalatschinow') initiated a civil action in the Philadelphia Court of Common Pleas for wrongful use of civil proceedings and abuse of process pursuant to The Dragonetti Act , 42 Pa. C.S.A. section 8351 et.seq., against Picard Losier and Associates, a sole practitioner law firm owned and operated by petitioner Picard Losier ('Losier'), Alex H. Pierre, Esquire, ('Pierre'), an associate attorney of the firm, and Anthony Bombaci ('Bombaci'), a client of the firm represented by Alex H. Pierre.

Kalatschinow's action was predicated upon a civil action initiated by Pierre on Bombaci's behalf against Sassafras International Café, a restaurant owned by Kalatschinow [Anthony Bombaci v. Sassafras International Café ('Sassafras'), Philadelphia Common Pleas Court, Civil Division, April Term, 1998, No. 1257 ('the underlying action').

In the underlying action, Bombaci, an employee of Sassafras, alleged that after he and Kalatschinow had an altercation regarding another employee, that Kalatschinow assaulted him as he was leaving the restaurant. The underlying action was grounded upon Sassafras' breach of duty to ensure Bombaci's safety, and Kalatschinow was not named personally as a defendant in the underlying action.

Throughout pre-trial proceedings in the underlying action, Bombaci cooperated with Sassafras' investigation of the case. Bombaci presented an affidavit from a friend, Anthony Curci, who stated therein that he had witnessed Kalatschinow's assault against Bombaci Trial Court Opinion (A-1), at . Based upon information Bombaci provided to him regarding his medical treatment and the cost thereof, Losier's associate attorney, Pierre assisted Bombaci in answering interrogatories

propounded by Sassafras. A-1, at). Additionally, Bombaci gave extensive testimony at a deposition regarding the alleged assault, his injuries, and the medical treatment he received, identifying Dr. Yves Jerome as his treating physician (. However, at an arbitration hearing on December 10, 1998, neither Anthony Curci nor Dr. Jerome personally appeared on Bombaci's behalf, and the arbitrators entered judgment for Sassafras International Cafe. Attorney Pierre prepared a notice of appeal and provided it to Bombaci for filing for a trial de novo (A-1, at 3).

As a result of the failure of Dr. Jerome to appear for a deposition, Kalatschinow moved the Court to preclude Bombaci from introducing expert testimony at trial. On March 26, 1999, by agreement of the parties, the Court ordered Dr. Jerome to appear and be deposed.

At the deposition conducted on May 7, 1999, Dr. Jerome testified that when he received a subpoena of Bombaci's medical records in 1998, he searched his files but found that none existed for him, and therefore concluded that he had not treated Bombaci (A-1, at 3). Thereafter, Sassafras and Bombaci, by and through counsel, mutually agreed that Bombaci's suit should be withdrawn. On August 4, 1999, a praecipe to withdraw the appeal from the award of the arbitrators was filed, and on September 12, 1999, the underlying action was discontinued. (A-1, at 4).

On June 8, 2000, Kalatschinow filed the civil complaint for wrongful use of civil proceedings and abuse of process, against Pierre, Losier, and Bombaci. On August 14, 2000, after Pierre, Losier and Bombaci failed to file a responsive pleading to Kalatschinow's complaint, upon praecipe of Kalatschinow's counsel, the Philadelphia Common Pleas Court entered judgment by default against Pierre and Losier (A-1, at 5). Within one

week of the entry of default judgment, on August 21, 2000, Pierre and Losier petitioned the court for relief from default judgment, attaching thereto, and filing simultaneously therewith, a responsive pleading in the form of preliminary objections to the complaint. Pa. R.C.P. 237.3 (b), in effect on the date Losier filed his petition for relief from default, provided, in part, that:

> "if the petition [for relief from default judgment]is filed within ten days after the entry of judgment on the docket, the court shall open the judgment if the proposed complaint or answer states a meritorious cause of action or defense."

Additionally, in the case of Peters Township Sanitary Authority v. American Home and Land Development Co., 696 A.2d 899 (Pa. Cmwlth. 1997), the Commonwealth Court of Pennsylvania[1] had held that preliminary objections are a proper responsive pleading which may be attached to a timely petition for relief from default judgment.

Notwithstanding that Pa. R.C.P. 237.3(b) virtually mandated that the court provide relief from a default judgment for a petition filed within ten days after entry thereof, and the Commonwealth Court's holding in Peters Township, *supra*, the trial court denied Losier's petition. The court also denied two motions for reconsideration of the court's denial of the petition.

On June 3-4, 2002, a non-jury trial took place, limited to the issue of the amount of Kalatschinow's

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[1] Pennsylvania's Commonwealth Court is an intermediate appellate court equivalent to the Pennsylvania Superior Court in cases where the Commonwealth of Pennsylvania, or an agency or subdivision thereof is a party.

damages. Under 42 Pa.C.S.A. section 8353, a successful plaintiff is entitled to compensatory damages for economic losses from dispossession or interference with the advantageous use of his property, harm to his reputation, attorney's fees and other expenses reasonably incurred in defending himself in the underlying matter, specific pecuniary losses resulting from the proceedings, emotional distress, and punitive damages according to law in appropriate cases.

Under 42 Pa.C.S.A. section 8354, the plaintiff (Kalatschinow) bears the burden of proving damages provided under section 8353 (A-6). However, at trial to determine the amount of his damages, Kalatschinow admitted that he incurred no attorney's fees and expenses, and failed to substantiate any specific pecuniary losses of his business and harm to his reputation. (A-1, at 19).

As to his claim of emotional distress, Kalatschinow testified that when Bombaci filed the suit against him he was "scared" and "nervous", however, he further testified that he thought the underlying action had been a "joke" and that "the whole situation was unbelievable" (A-1, at 19). This evidence was insufficient as a matter of law to establish that Kalatschinow suffered from emotional distress as that term has been defined and interpreted by the Pennsylvania Supreme Court. In Kazatsky v. King David Memorial Park, 515 Pa. 183 (1987), Pennsylvania's highest court had held that recovery of damages for emotional distress should be limited to cases of

> "serious mental distress to situations where a reasonable person normally constituted would be unable to adequately cope with the mental distress engendered by the circumstances of the event."

515 Pa. at 193.

Notwithstanding the total lack of evidence supporting Kalatschinow's claims that Pierre's conduct of the underlying action had caused him to suffer pecuniary losses, harm to his reputation, and emotional distress as that term has been defined by Pennsylvania's highest court, the trial court awarded both compensatory and punitive damages for Kalatschinow and against Pierre, Losier, and Bombaci for harm to his reputation and emotional distress.

With respect to Losier, the trial court awarded compensatory damages in the amount of $ 10,000.00, punitive damages in the amount of $17,000.00 on the basis of Losier's vicarious liability for the actions of associate attorney Pierre, and a separate punitive damage award against Losier in the amount of $10,000.00. The combined punitive damages award of $27,000.00 alone represented almost one third of Losier's average yearly net income of $103,970.00, and is almost six times the amount in fines and penalties that could have been imposed against Losier had he been charged and adjudicated guilty under comparable criminal statutes.[2]

In imposing punitive damages against Losier, the trial court specifically held that "compensatory damages need not be awarded in order to award punitive damages, nor must they be proportionate to compensatory damages." (A-1, at 21).

Losier timely filed for post-trial relief, however the lower court denied post-verdict motions on September

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[2] The criminal offense that is most analogous to attorney Pierre's actions, filing a false statement or claim with an insurance company (18 Pa. C.S.A. § 4117) carries a maximum fine of $ 5,000.00 for a first offense.

12, 2002. On September 26, 2002, Losier appealed the trial court's judgment to the Pennsylvania Superior Court.

While Losier's appeal was pending in the Pennsylvania Superior Court, on April 7, 2003, this Court rendered its decision in State Farm Mutual Automobile Insurance Company v. Campbell, et.al., 538 U.S. 408, 123 S. Ct. 1513; 155 L. Ed. 2d 585 (2003).

In his brief submitted to the Pennsylvania Superior Court, Losier asserted that the trial court had denied him due process and equal protection of the laws of the Commonwealth on the following grounds:

(1) the trial court denied Losier's right to relief from default judgment under Pa. R.C.P. 237 by retroactively applying a rule of law that was not in effect at the time Losier filed his petition for relief, and thus Losier was deprived of equal protection of the laws in effect at the time he filed his petition (A-2, at 13-15);

(2) by establishing a lower burden of proof for plaintiffs claiming emotional distress in civil cases under the Dragonetti Act than that for plaintiffs claiming emotional distress in other civil cases, Losier was denied due process and equal protection of the laws (A-2, at 20-26); and

(3) the trial court's punitive damages award was excessive and arbitrary, in violation of Fourteenth Amendment to the United States Constitution and not in accordance with the criteria set forth in this Court's decisions in and did not comport with the

> minimum due process in light of this Court's decisions in Campbell, and BMW of North America Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L .Ed. 2d 809 (1996) (A-2, at 33-37).

On May 18, 2004, the Pennsylvania Superior Court affirmed the judgment of the trial court, specifically relying upon and adopting in its entirety, the reasoning of the trial court's opinion. (PA Super. Ct. Opinion, A-3) . In so doing, the Pennsylvania Superior Court never considered, addressed, or discussed this Court's decisions in Gore and Campbell, or their application and effect upon the trial court's award of punitive damages against Losier.

Losier then timely petitioned the Pennsylvania Supreme Court for allowance of appeal (A-4). On October 28, 2004, the Pennsylvania Supreme Court denied Losier's petition (A-5). Losier timely filed a petition for reconsideration, on November 12, 2004 (A-6).

On December 15, 2004, the Pennsylvania Supreme Court denied Losier's petition for reconsideration without opinion, thereby affirming the Pennsylvania Superior Court's judgment. (A-7)

In State Farm Mutual Automobile Insurance Company v. Campbell, *supra*, this Court stated:

> The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor [citing Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S.

424,433 (2001), and BMW of North America Inc., v. Gore, 517 U.S. 559, 562, 587 (1996)]…. The reason is that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."*Id.*, at 574; *Cooper Industries, supra,* at 433 (quotations omitted)…. A State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim [citing Pacific Mut. Life Ins. Co. v. Haislip, 499 U.S. 1, 59(1991)]. Our concerns are heightened when the decisionmaker is presented…with evidence that has little bearing as to the amount of punitive damages that should be awarded.

….

In light of these concerns, in *Gore, supra,* we instructed courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Id.*, at 575. We

> reiterated the importance of these guideposts in *Cooper Industries* and mandated appellate courts to conduct de novo review of a trial court's application of them to the jury's award. 532 U.S. at 424. Exacting appellate review ensures that an award of punitive damages is based upon an "application of law, rather than a decision maker's caprice." *Id.*, at 436 (quoting *Gore*, *supra* at 587 (Breyer, J., concurring)).

This Court further stated that under the principles set forth in Gore, that

> "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore, supra*, at 575. We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortuous conduct evinced as indifference to or reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery or deceit, or mere accident. 517 U.S., at 576-577. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of them

> all renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. *Id.*, at 575.

Campbell, 538 U.S. at _____.

In contravention of this Court's directives in Gore and Campbell, the Pennsylvania Superior and Supreme Courts never conducted a *de novo* review of the Philadelphia trial court's award of punitive damages against Losier. Nor did the Pennsylvania appellate courts apply the criteria for determining punitive damages set forth in Gore and Campbell. Had they done so, upon a thorough review of the trial court's opinion, it would have been readily apparent that, in light of the scant evidence Kalatschinow presented in support of his claim that Pierre's and Losier's conduct in the underlying action had caused him emotional distress and harmed his reputation[3], Kalatschinow was more than made whole by the award of $10,000.00 in compensatory damages, and that he had had failed to prove that either petitioner

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[3] Kalatschinow testified that as a result of the suit being filed against him, he felt "scared" and "nervous", but also that he thought Bombaci's suit was " a joke" , in that, "the whole situation was unbelievable." A-1, at 5-6. Although he also testified that after the lawsuit two of his patrons stopped coming to the restaurant, the trial court acknowledged that Kalatschinow presented no evidence to explain why they stopped patronizing his establishment. A-1, at 4, 19.

Picard Losier, the principal of Picard Losier & Associates, or his associate attorney Alex H. Pierre, had engaged in the kind of reprehensible conduct in the underlying action which would warrant the imposition of punitive damages .

Kalatschinow did not substantiate any physical injuries or economic losses. A-1 at 19. Although it was alleged that he had assaulted Bombaci, Kalatschinow was not the "target" of the underlying action. Additionally, while Bombaci in initiating suit may have evinced a malicious intent toward Kalatschinow, as to attorneys Pierre and Losier, the conduct that the trial court found to be so offensive, consisted of a single arguably wrongful act- attorney Pierre's preparation of answers to interrogatories regarding Bombaci's injuries and medical treatment, before he had obtained any medical verification from Bombaci's physician. A-1, at 3, 16. All other services that Pierre performed – preparing and filing Bombaci's complaint, representing Bombaci before the Board of Arbitrators, preparing Bombaci's legal papers so that he could perfect his appeal, attending the deposition of Bombaci's physician, - are all legal services that attorneys normally and routinely perform, and are expected to perform, in the course of representing a client.

It was further apparent from the record that petitioner Picard Losier, the principal and sole proprietor of Picard Losier & Associates, engaged and compensated co-defendant attorney Alex H. Pierre as an independent contractor to handle legal matters outside of the firm's regular area of practice, that Mr. Losier did not assume any responsibilities with respect to the representation of Bombaci in the underlying action, and did not supervise, manage, or direct attorney Alex H. Pierre, in the initiation and continuation of the underlying action, so as to

warrant imposition of punitive damages on the basis of vicarious liability. The record below established that the relationship between Losier and Pierre amounted to an agreement between two independent attorneys handling different types of cases, in which Losier agreed to share with Pierre, a percentage of the fees earned on the cases Pierre handled for the firm, based on his productivity and performance. A-1, at 23.

REASONS FOR GRANTING THE WRIT

In affirming the award of $ 27,000.00 in punitive damages against petitioner Picard Losier and Associates, where either no evidence or insufficient evidence was presented at trial to justify such an award, and the award was in excess of five times the amount which could have been imposed under comparable criminal statutes, the Supreme and subordinate courts of the Commonwealth of Pennsylvania have deprived petitioner Losier of his property without due process of law, and denied him equal protection of the law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and in conflict with this Court's decisions in BMW v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed 2d 809 (1996), and State Farm Mutual Auto Insurance Company v Campbell, 538 U.S. 408, 123 S. Ct. 1513; 155 L. Ed. 2d 585 (2003).

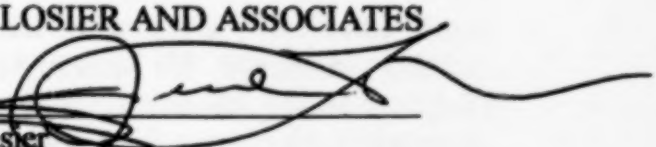
The Pennsylvania courts also denied Losier due process of law and equal protection of the laws of the Commonwealth of Pennsylvania in that the Pennsylvania courts established a lesser burden of proof for plaintiffs claiming damages for emotional distress under the Dragonetti Act, than for plaintiffs claiming emotional distress in other civil actions, thus facilitating excessive

The Pennsylvania courts further denied Losier due process of law and equal protection of the laws of the Commonwealth of Pennsylvania in that the Pennsylvania courts denied Losier the right to file a responsive pleading to Kalatschinow's complaint in the form of preliminary objections, by retroactively applying a comment to a procedural rule that was not in effect at the time Losier filed his responsive pleading, and which comment had been overruled by the Pennsylvania Superior Court. The Pennsylvania courts have refused to follow their own rules and decisional precedents, and thus they have denied Losier due process and equal protection of the laws in violation of Losier's rights under the Fifth and Fourteenth Amendments to the United States Constitution.

Wherefore, Petitioner Picard Losier and Associates request that this Honorable Court grant the writ, and after submission of briefs and hearing of oral arguments on the issues raised herein, reverse the decision of the Pennsylvania Supreme Court affirming the judgment of the Pennsylvania Superior Court and the Philadelphia Common Pleas Court, and remand this matter for a decision in accordance with the minimum standards of due process and equal protection established under Fifth and Fourteenth Amendments of the United States Constitution as interpreted and construed by this Honorable Court.

Respectfully submitted,

PICARD LOSIER AND ASSOCIATES
By:



Picard Losier
Petitioner